Nos. 20261 and 20262

United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE HANN, et al,

Appellants,

v.

J. J. NAYLOR,

Appellee.

APPELLANTS REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

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THE ISSUE

We agree with appellee when he states that the issue here is "whether or not an agreement, in fact, had ever been entered into by the parties under the existing circumstances of the case" (Appellee's Br. at p. 4). We also agree that this issue can be a question of fact. It is, however, a naive approach to assume that it is *only* a question of fact. In a sense, all factual issues must be framed

within the law, and it is the law that a man may not avoid his objective manifestations of agreement by proof of subjective intent (See Appellants' Br. at p. 16).

All of appellee's proof was designed to establish the fact that within his mind he did not intend to agree. This latter proof is incompetent and irrelevant and is not sufficient to overcome appellants' uncontradicted proof that on thirty occasions over a two and one-half year period appellee stated in writing that he agreed to be bound by the Trust Agreements and to make contributions to the Trust Funds in accordance with the current collective bargaining agreement; that appellee did in fact make said contributions for thirty months from January, 1960, through June, 1962; that appellee's employees filed claims for and received benefits from the Health and Welfare Trust Fund on twenty-six occasions.[1]

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[1] At page 3 of the Answering Brief, appellee attempts to confuse the facts by implying that the twenty-six claims were not paid by plaintiffs. Mr. Alan Emrick, Assistant Trust Officer of the U. S. National Bank of Oregon, which is the administrator of appellant trust funds, testified:

> "Q. Have employees of the defendant filed any claims upon which eligibility (sic) would be effected (sic)?
> "A. Yes.
> "Q. Roughly, how many?
> "A. The number of employees or the number of claims?
> "Q. The number of claims that were filed and *forwarded for payment?*
> "A. Twenty-six." (Emphasis supplied) (Tr. 16)

And the Trial Judge understood the testimony to mean that claims were in fact honored by the payment of benefits, when the Court asked Mr. Emrick:

> "THE COURT: You had employees of Mr. Naylor subsequent to June in 1962, who have made claims to the fund then, *who have been paid?*
> "A. Yes." (Emphasis supplied) (Tr. 16)

Even the appellee himself was aware that on at least one occasion, his employee received benefits from the Fund (Tr. 30).

The decision of the Trial Judge was clearly erroneous in this cause because (1) it is not supported by correct interpretations of the law and (2) there is absolutely no competent evidence to support the finding that appellee's overt acts did not contractually bind him. Thus, the Trial Court's decision was error, not just because he erroneously decided a question of fact, but rather because his decision also flies into the face of the law. Consequently, while the central issue is whether *vel non* the appellee bound himself to the Agreements, there is before this Court at least two issues of law and of national labor policy,[2] which stem therefrom:

> (1) Can an employer be bound to a § 302 trust fund by virtue of signing language of agreement contained in a remittance report form, especially when he has done so for thirty consecutive months?
>
> (2) If he can be so bound, can he nevertheless void such contractual obligation by his own testimony that he did not in his own mind intend to bind himself?

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[2] Appellee errs as to the law when he states that this Court is bound to follow the substantive law of the state. (Appellee's brief at p. 5). The United States Supreme Court in *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459, 470 (1960), makes it clear that cases arising under the federal labor statutes require the formation of a new body of substantive law by the federal courts to be guided by a new national labor policy, which may require different rules from those of the traditional rules of contract law. See *Lewis* v. *Mears,* 297 F.2d 101, 104 (1962). Thus appellants do here strongly assert that the federal cases at pages 12 to 16 of appellants' opening brief are still the more crucial case decisions. Nevertheless, in forming this new federal substantive law and in keeping with the common law principle of *stare decisis,* this Court may, of course, consider State decisions.

REBUTTAL ARGUMENT

Argument in Detail

A. Appellee's Reading of the Remittance Form:

At page 10 of appellee's brief, he attempts to make the point that he did not read the Agreement language on the thirty remittance reports. However, it is interesting to note that he must have read the language of instructions on said reports, which is of the same size print as the language of agreement, inasmuch as he did correctly fill out the reports for thirty months (See Ex. 1).

Did the appellee actually ever read the language? The question is philosophically impossible and legally not pertinent. The real question under law, however, is this: Is it reasonable to assume that appellee read or had the fair opportunity to read the language? [See appellant's Opening Brief at pp. 18-19]

The language is too conspicuous, too cogent, too simply stated for anyone to declare its invisibility and indirection, especially after having witnessed it every month for two and one-half years, and especially when one considers that appellee is after all a businessman who has been in construction contracting since 1957 (Tr. 22), a member of an association of employers (Tr. 26), a union carpenter himself (Tr. 32), and an apparent believer in the trade union concept (Tr. 32).

B. The So-Called "Fine Print":

Appellee states at numerous occasions in his brief that the remittance report language of agreement was "fine or small print" (Appellee's Br. pp. 2, 4, 10). In this regard we direct the Court's attention to Plaintiffs' Ex. 1, which are the actual remittance reports. We ask the Court to take notice of the fact that the print in question is in *bold face* type; that it appears *directly above* the signature block and is the *only language* above the signature block; that the print in question is *no smaller* than any of the other textual matters on the page; that the remittance report is only *one page* and has *no secret corners* or "back-of-the-page" verbage;[3] that the textual matter on the page is *short and concise* and not wrapped in any pleonastic syntax.

This is the report form which appellee filled out and signed thirty times once a month for two and one-half years. It is impossible to believe that appellee never had any occasion in all that time to read the agreement language. It is equally impossible to believe that having read the language, the appellee still did not know that by signing under it he was binding himself to the Trust Agreement and binding himself to make contributions to the Funds.

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[3] Accordingly, appellee's citation of *Arthur Phillip Export Co. v. Leatherstone, Inc.*, 87 NYS2d 665 (1949) is distinguishable inasmuch as in the latter case the issue was whether or not language on the reverse side of an order form is binding in the party signing the front side of the order form.

C. The Remittance Form:

Appellee also cites a line of cases regarding printed matters appearing at the top of or on the back of or at some other inconspicuous spot outside the main text of a letter or billhead or order blank; in the same vein, Appellee cites a line of cases regarding the attaching of a signature to a paper when the signer reasonably assumes it to be a paper of different character, *i.e.* not a contract (Appellee Br. p. 8).

> "The principal question in deciding cases of this kind is whether the facts present a case where the person receiving the paper should as a reasonable man understand that it contained terms of the contract which he must read at his peril, and regard as part of the proposed agreement. The precise facts of each case are important in reaching a conclusion." 1 Williston on Contracts, § 90 D at 313.

Thus, once again we must return to the precise facts of this case: It is important to recognize in the case at bar (as distinct from the foregoing authorities cited by Appellee) that there was not just *one* signing, there were thirty signings; that the pertinent language on the remittance form was not located at any distance away from the signature block, it was located immediately above the signature block;[4] that the remittance forms

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[4] In *Slim Olson, Inc.* v. *Winegar,* 122 Utah 80, 246 P.2d 608 (1952), the defendant was held bound to an agreement to pay attorney fees in case of default, which agreement appeared in a sales slip. The agreement language appeared immediately above the signature block rather than on the back of the sales slip or in its letterhead. Forty-seven such sales slips had been signed personally by the defendant. The document is reproduced in the opinion, and Appellants here direct this Court's attention to the general similarity of the sales slip to the remittance report forms in the case at bar.

do not contain a great morass of words and pages, but rather the form is a simple, concise, one-page document; that Appellee and Appellant did in fact follow the terms of the agreement for two and one-half years by making contributions and by paying benefits respectively, and Appellee was silent for all that time concerning his obligation to the Trusts; that Appellee has not pleaded or proved or does not now contend that there were any affirmative acts of fraud, duress, mistake, misrepresentation, failure of condition precedent or otherwise; that all of Appellee's evidence simply amounts to his own self-serving statements that he did not intend to make a contract with Appellants.

D. Reference to Extrinsic Writing:

Appellee cites the case of *Newton* v. *Smith Motors, Inc.*, 122 Vt. 409, 175 A.2d 514 (1961) for the proposition that extrinsic writings referred to in an agreement must be connected thereto by specific reference or mutual knowledge and understanding (Appellee's Br. p. 8).

Appellants heartily endorse this proposition and assert that such was the case in the matter at bar. The remittance form agreement, signed by Appellee thirty times, specifically refers to the Trust Agreements and the current collective bargaining agreement. The Court in the *Newton* case said this:

> "It is of course well established that a contract may be reached with reference to another writing, and the other document, or so much of it as is referred to, will be interpreted as a part of the main instrument." *Id.* at 174 A.2d 516 *and* see authorities in Appellant's Opening Brief at p. 17.

E. Definiteness of the Contract and Mutual Assent:

Appellee relies heavily upon the Oregon case of *Klimek* v. *Perisich,* 231 Or. 71, 371 P.2d 956 (1962). The case is not persuasive here and is not on all fours with the case *sub judice*. The *Klimek* case involves a purported house remodeling contract between a contractor and the owner. The Court held there was no contract because of indefiniteness and failure to establish a meeting of the minds. Appellants would concur with the decision of the Court in *Klimek* when the Court reaffirms established elementary rules of contract law concerning offer, acceptance, mutual assent, and reasonable certainty of terms. But the case is not apposite to the case at bar because in *Klimek,* the attempted contract hinged upon mere oral negotiations and estimates never reduced to writing or to definite terms; whereas in the case at bar, there is an unequivocal, written adoption of more detailed, very definite, written Trust Agreements and Labor Agreement.

However, the Court in the *Klimek* case does make one very important observation, which is quite germane to the case *sub judice*: The Court in *Klimek* distinguishes the case of *Helm* v. *Speith,* 298 Ky. 225, 182 S.W.2d 635. In the latter case, negotiations were found to be definite enough to amount to a contract because the parties adopted the detailed requirements of the Federal Housing Administration. The Court in *Klimek* says this about the *Helm* case:

> "In this case [*Helm*] the parties agreed that the building should be contracted to comply with the

> minimal requirements of the Federal Housing Administration requirements and the Federal Housing Administration requirements were introduced into evidence. It appears from the case that, having agreed to the FHA requirements, which contain detailed specifications, the agreement, by referring to the FHA requirements, made the subject matter sufficiently definite for enforcement, * * *." *Klimek* v. *Perisich,* 231 Or. 71, 82, 371 P.2d 956, 961 (1962).

The case at bar is more in line with *Helm* than with *Klimek* in that Appellee did expressly agree to adopt the Trust Agreements and the pertinent portions of the collective bargaining agreements, which latter Agreements are sufficiently detailed to satisfy the element of reasonable certainty in contracts.

F. A Concluding Argument:

Why did Appellee pay contributions monthly? The answer must be to gain from the Appellant Trust Funds benefits for his employees and their dependents. But having made these contributions, could the Appellant-Trustees have refused to give those benefits? If the Trustees had refused to give benefits after Appellee had contributed for two and one-half years, is it not clear that Appellee or his employees could have sued the Trustees? And if they could have sued for benefits, how could they have done so if there were "no contract"? If Appellee was contributing to the Funds for two and one-half years, knowing that he could never hold the Trustees to any promise to pay benefits, was he not doing a rather fruitless thing? No, it seems patently clear that a contributor to a health and welfare fund or

a pension fund does so because of an *agreement* between himself and the funds to which he contributes. If this contract is void (rather than voidable at the option of either party), then there would have been no duty on the part of the trustees to have paid the benefits to employees.

However, there *was* a contract between the parties here; after two and one-half years of contributions and benefits paid there had to be. The national labor policy compels this conclusion. *Lewis* v. *Cable,* 107 F. Supp. 196 (D.C.W.D. Pa. 1952).

The question then before the Trial Court logically ought to have been: Inasmuch as there is a contract, can the Appellee contributor terminate that contract at his option, or is he bound for a specified period? An interpretation of the existing contract would have answered that more germane question. See App. to Appellants' Opening Brief.

CONCLUSION

We respectfully submit that this cause be reversed as prayed for in our Opening Brief.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellant